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of the act in question, when circumstances warrant the receiving of such evidence. Although this may never be established to the last second, such hair-splitting is not always necessary in order to do justice. Frequently, a showing that an act was approved in the morning or afternoon, or before or after a certain hour, may be sufficient to establish the actual priority of the events in question,[19] and thus lead to a verdict based upon fact rather than presumption.

Finally, it is submitted that this was a proper case for the disregarding of the general rule; that since the court properly placed upon the Commonwealth the burden of proving that the statute was actually in effect at the time of decedent's death, the court acted correctly in refusing to apply the presumption of the general rule in the absence of any evidence from the Commonwealth that the statute had been passed before decedent's death.

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Constitutional Law—Validity of Penalties Imposed by States on Interstate Carriers for Violation of Weight and Size Regulations

Extensive use of the public highways by intrastate and interstate trucking has caused states to resort to regulation of weights and sizes of trucks.[1] With the enactment of such legislation, both before and after Congress acted on the subject, courts have been faced with two problems: (1) whether a state in the exercise of its police power can regulate interstate carriers, and (2) what penalties a state may impose on an interstate carrier for violation of the state regulation.

In 1924, Mr. Justice Brandeis, in *Buck v. Kuykendall*,[2] declared that

[19] *In re* Dreyfous, 28 Abb. N. Cas. 27, 18 N. Y. Supp. 767 (1892), is quite similar to the principal case. A proceeding was brought to impose a tax of 1 per cent on property bequeathed to the wife of deceased. The act under which the tax was levied was approved on 20 April, 1891, after 8 o'clock. The decedent died before 8 o'clock. It was held that the tax did not apply, since decedent's death occurred before the passage of the act.

[1] ALA. CODE tit. 36 §§ 89-94 (1940); IOWA CODE ANN. c. 321, §§ 321.452-321.481 (1949); N. C. GEN. STAT. §§ 20-116, 20-118 (1953); N. Y. VEHICLE AND TRAFFIC LAW § 14; OHIO. REV. CODE c. 4513 (1954). Every state has enacted either similar legislation or legislation accomplishing the same result.

[2] 267 U. S. 307, 315-316 (1924). Plaintiff desired to operate an auto stage line exclusively in interstate commerce, from a city in one state to a city in another. Oregon granted him a license, but Washington refused, saying the territory had been filled. In an action to enjoin enforcement of the applicable Washington law, the Court declared the state action unconstitutional, saying, "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. . . . Its effect upon such commerce is not merely to burden, but to obstruct it. Such action is forbidden by the Commerce Clause." (It should be noted that this was before any federal legislation on the subject of carriers in interstate commerce.) This has been precedent for all subsequent cases where there has been the possibility of discriminating against interstate commerce. See also: George W. Bush & Sons Co.

a state could *not* discriminate against interstate carriers, and later in *Morris v. Duby*,[3] the Supreme Court set forth generally, what a state *might* do by saying, "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation, especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

With the passage of the Federal Motor Carrier Act of 1935,[4] the question arose to to whether this national legislation preëmpted the field from state regulation of weights and sizes of interstate trucks. State[5]

v. Maloy, 267 U. S. 317, 324-325 (1925). The Court there said: "The State action in the Buck case was held to be unconstitutional not because the statute prescribed an arbitrary test for the granting of permits, or because the director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved by the Commerce Clause for federal regulation."

[3] 274 U. S. 135, 143 (1927). (Action by motor carrier to restrain Oregon officials from enforcing a highway commission order reducing maximum load from 22,000 pounds to 16,500 pounds. The Court held that although the order prevented competition, since the carrier could not carry as much, such a consideration was outweighed when competent authority deemed such weight injurious to the highway for the use by the general public and unduly increased the cost of maintenance and repair. The only way to attack this state action was to show that it was arbitrary and unreasonable.) In Sproles v. Binford, 286 U. S. 374, 388-389 (1932) where carrier sought to restrain Texas state officials from enforcing the weight and size limitations of the Motor Vehicle Act, the Court held the statute constitutional, saying, "In exercising its authority over its highways, the state is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the state may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment intended to secure. When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." Plaintiff said this was unconstitutional class legislation because passenger travel was treated differently, but the Court held that the peculiar importance of transportation for persons to provide communities with resources, both of employment and recreation, along with educational and social interests, were sufficient to support this classification.

[4] 49 STAT. 543, 49 U. S. C. § 301, *et seq.* (Supp. 1935), as amended, 54 STAT. 919 (1940), 49 U. S. C. § 301, *et seq.* (1952).

[5] Whitney v. Fife, 270 Ky. 434, 109 S. W. 2d 832 (1937) (Writ of prohibition to restrain judge from issuing warrants of arrest and prosecuting plaintiffs for violation of the weight limit law); Smithart v. State, 133 Tex. Crim. Rep. 145, 109 S. W. 2d 207 (1937); Johnson v. State, 133 Tex. Crim. Rep. 144, 109 S. W. 2d

and federal courts,[6] when confronted with the problem, held that it did not. In 1938, the Supreme Court decided, in *South Carolina Highway Dept. v. Barnwell Bros. Inc.*,[7] that such state legislation was a proper exercise of the police power. In reviewing the history of Section 225 of the federal act of 1935,[8] concerning weights and sizes, the Court in *Maurer v. Hamilton*,[9] declared that since Congress had not specifically

207 (1937); Morrison v. State, 133 Tex. Crim. Rep. 141, 109 S. W. 2d 205 (1937) (where truck driver appealed from the imposition of a fine for violating the weight load regulation).

[6] Werner Transportation Co. v. Hughes, 19 F. Supp. 425, 432 (N. D. Ill. 1937) (Suit by motor carriers to restrain Secretary of State of Illinois from enforcing state weight load limitations. The court, in denying the injunction, said: "While of course, a state may not discriminate against interstate commerce in the absence of national legislation, especially covering the subject, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." The fact that surrounding states had a higher weight limit did not mean that the statute imposed an unreasonable burden upon interstate commerce.).

[7] 303 U. S. 177, 189-190, *rehearing denied*, 303 U. S. 667 (1938). Plaintiffs sought to restrain state officials from enforcing the weight and size statute of South Carolina contending that it violated the due process clause of the Fourteenth Amendment, had been superseded by federal legislation, and imposed an unconstitutional burden on interstate commerce. The South Carolina statute prescribed a maximum width for vehicles of 90 inches, whereas other states normally allowed 96 inches. The Court reversed the district court's holding that this statute excessively burdened interstate commerce, saying, "so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. . . . In the absence of such legislation [Congressional] the judicial function, under the Commerce Clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen, are reasonably adapted to the end sought."

[8] Originally, at the time of Maurer v. Hamilton, 309 U. S. 598 (1940), this was section 225 of the Federal Motor Carrier Act. Substantially unchanged, today it is in Part II of the Interstate Commerce Act, 49 U. S. C. § 325, and reads: "The Commission is authorized to investigate and report on the need for federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle and in such investigation the Commission shall avail itself of the assistance of all departments and bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

[9] 309 U. S. 598 (1940). Plaintiffs, carriers of new autos by motortruck, sought to restrain enforcement of Pennsylvania Motor Vehicle Code, contending the federal legislation superseded this state act. The Court interpreted Section 225 as creating strictly an investigatory power and, without clear and specific legislation on the subject, power to regulate was reserved to the states. Many cases have followed this interpretation, and it stands today: Lattavo Bros., Inc. v. Hudock, 119 F. Supp. 587, 589 (W. D. Pa. 1953), *aff'd*, 347 U. S. 910 (1954) (Plaintiff sought injunction restraining public official from enforcing weight limitations of Pennsylvania Motor Vehicle Code, by which plaintiff was detained and required to remove his excess load, and arrested with requirement to pay fine. In denying the injunction, the court said, "It is no longer open to dispute that a state in the exercise of its police power and in the absence of Congressional action, may impose *reasonable restrictions* upon the weight and size of vehicles which travel over its highways, equally applicable to intrastate and interstate commerce, without running afoul of the Commerce or Due Process Clause. . . ." [emphasis supplied]); Whitney v. Johnson, 37 F. Supp. 65 (E. D. Ky. 1941) (interstate motor carriers

provided for regulation, the power was thereby reserved to the states. This section has remained substantially unchanged, and without further act of Congress, it is well established today that states may regulate the weights and sizes of interstate carriers.

However, by the recent decision of *Castle v. Hayes Freight Lines, Inc.*,[10] a case involving penalties which may be imposed on interstate

were denied injunction to restrain enforcement of weight law); Philadelphia-Detroit Lines, Inc. v. Simpson, 37 F. Supp. 314 (S. D. W. Va. 1940), *aff'd*, 312 U. S. 655 (1941) (Carrier of autos sought injunction retraining enforcement of weight and size laws and was denied); Darnall Trucking Co. v. H. Simpson, 122 W. Va. 656, 12 S. E. 2d 516, *appeal dismissed*, 313 U. S. 549 (1940).

[10] 348 U. S. 61, 64 (1954). In this case an interstate carrier, operating under a certificate of convenience and necessity from the ICC, and from the state agency, sought to enjoin state authorities from enforcing the state regulation provided for the suspension of the carrier's right to use the highways for ninety days, or one year for habitual violators, on the ground that such an enforcement measure conflicted with the Federal Motor Carrier Act. The Supreme Court of Illinois, in Hayes Freight Lines, Inc. v. Castle, 2 Ill. 2d 58, 117 N. E. 2d 106 (1954), declared that the penalty could not be imposed on interstate operators, but could be imposed on intrastate operators. The U. S. Supreme Court affirmed, the substance of the reasoning being, that since the Federal Motor Carrier Act is all embracing with regard to issuance and suspension of certificates of public convenience and necessity "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission granted right to operate." As to whether the public interest requiring safe highways necessitates the suspension of right to use the highways for habitual violators of the weight limit, *quaere*.

It appears that a state may impose many burdens on interstate carriers without fatally obstructing interstate commerce: In Lloyd A. Fry Roofing Co. v. Wood, 344 U. S. 157, 162 (1952), *rehearing denied*, 345 U. S. 913 (1953), an Arkansas statute requiring interstate as well as intrastate carriers to obtain a permit, was held constitutional. Mr. Justice Black there said: "In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce and that a mere requirement for a permit is not such a burden. *It will be time enough to consider apprehended burdensome conditions when and if the state attempts to enforce them.*" (Emphasis supplied.) But the Court said the state had no discretionary right to refuse the permit to the interstate carrier. For other examples see: Aero Mayflower Transit Co. v. Bd. of R. R. Commissioners, 332 U. S. 495 (1947) (annual state tax levied on interstate carriers for use of highways allowed); California v. Thompson, 313 U. S. 109, 116 (1941) (A California statute required every transportation agent to procure a license from the state Railroad Commission, to pay a license fee, and to file a bond. The Court said: "If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern."); Eichholz v. Public Service Commission, 306 U. S. 268 (1939) (an interstate motor carrier's practice of hauling merchandise, consigned from St. Louis, Missouri, to persons in Kansas City, Missouri, over the state line to Kansas City, Kansas, and then back to its intended destination in Missouri, was a mere subterfuge to evade permit requirements of Missouri, and the state could require that he obtain a permit.); H. P. Welch Co. v. New Hampshire, 306 U. S. 79 (1939) (before Federal Motor Carrier Act's effective date, state law limited hours of duty for drivers); Clark v. Poor, 274 U. S. 554 (1927) (carrier required to procure certificate and pay a tax for use of highways); Kane v. New Jersey, 242 U. S. 160 (1916) (licensing and registration); Hendrick v. Maryland, 235 U. S. 610 (1915) (licensing and registration required of non-resident operators); Dohrn Transfer Co. v. Hoegh, 116 F. Supp. 177 (S. D.

carriers for violating these weight and size regulations, Mr. Justice Black said that although regulation by states was not of itself invalid, a state could not prohibit an interstate carrier from using the highways, even though the carrier had habitually violated the state law. His language was, "We are not persuaded . . . that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks." No indication was given as to what specific penalties a state could validly enforce, but the Court did point out that since the Interstate Commerce Commission could revoke certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission, and a Commission regulation requires that motor carriers abide by valid state highway regulations, relief to suspend a carrier would be through the Interstate Commerce Commission.

Before this decision, states had resorted to various methods to enforce their weight and size regulations. A very common one was allowing peace officers to weigh interstate vehicles, and upon finding them overloaded, require the removal of the excess weight.[11] Also, the driver could be arrested and the owner fined.[12] Injunctive relief[13] could be sought to force a carrier to comply with state regulations, and finally,

Iowa 1953) (state may condition use of highway by requiring a fee to maintain it); State v. Nagle, 148 Me. 197, 91 A. 2d 397 (1952) (license or permit); Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453 (1951) (city ordinance routing interstate traffic); McClean Trucking Co. v. City of New York, 116 N. Y. S. 2d 292 (1952) (city motor use tax pursuant to statutory authorization); Arrow Carrier Corp. v. Traffic Commission of City of New York, 99 N. Y. S. 2d 138 (1950) (routing traffic in city); Ex parte Truelock, 139 Tex. Crim. Rep. 365, 140 S. W. 2d 167 (1940) (requiring a certificate of public convenience and necessity).

[11] ALA. CODE, tit. 36, § 85 (1940); IOWA CODE ANN. c. 321, § 321.465 (1949); N. C. GEN. STAT. § 20-118.1 (1953); OHIO REV. CODE § 4513.33 (1954). Most of these statutes are very similar and read like the North Carolina statute, *supra:* "Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in event such scales are within 2 miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighng for the purpose of being weighed, shall be guilty of a misdemeanor."

[12] ALA. CODE tit. 36, § 83 (1940); IOWA CODE ANN. c. 321, §§ 321.477, 321.482 (1949); N. C. GEN. STAT. §§ 20-176, 20-118(1) (1953); N. Y. VEHICLE AND TRAFFIC LAW § 70 (1952); OHIO REV. CODE § 4513.99 (1954). It should be noted that these are typical provisions for enforcement although the manner of arriving at the penalty differs in the various states. North Carolina imposes a fine proportionate to amount of overload, others base the fine on the number of offenses committed, and others provide still other methods.

[13] N. C. GEN. STAT. § 62-121.34 (1950). This is part of the N. C. Motor Truck Act of 1947.

an action for damages[14] against the carrier could be brought by the government official in charge. These methods are still widely used, and the Supreme Court decision[15] apparently does not encompass them in its prohibition. But, when the penalty imposed results in a complete obstruction of interstate commerce, as in the *Hayes Freight Lines* case,[16] by suspending the carrier's right to use the highways of the state, the courts will strike the penalty. However, in the twilight area of balancing the state's interest in the safety and maintenance of its highways, against the national interest in protecting the free flow of interstate commerce, the Supreme Court will probably uphold reasonable state regulations which fall short of preventing interstate commerce. This conclusion would seem to follow from the provision[17] in many state statutes for a construction not in conflict with federal legislation or the Constitution.

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Labor Law—Railway Labor Act—Federal-State Conflict Over Union Shop

In 1951 Congress amended the Railway Labor Act[1] to permit carriers and the union representative of their employees to enter into "union shop" agreements[2] under certain conditions. The amendment specifically states the agreements may be entered into "nothwithstanding any other provisions of the Act, or of any other statute or law of the United States or territory thereof, or any state."[3] The problem is thus

[14] IOWA CODE ANN. c. 321, § 321.475 (1949). In such case the superintendent of Public Works sues the owner of the vehicle for the damages the vehicle does to the highway, and the recovery goes to the highway fund.

[15] Castle v. Hayes Freight Lines, Inc., 348 U. S. 61 (1954).

[16] *Ibid.*

[17] ALA. CODE, tit. 48, § 28 (1940); N. C. GEN. STAT. § 62-121.39 (1950). The North Carolina statute reads: "(1) This article shall apply to persons and vehicles engaged in interstate commerce over the highways of this state and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this State, and the observance of such reasonable rules and regulations as the Commismission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of the State, except insofar as the provisions of this article may be inconsistent with, or shall contravene, the Constitution and laws of the U. S. (2) The Commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act which may directly or indirectly affect the interests of the people of this state or the transportation policy declared by this article of the Interstate Commerce Act."

[1] 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

[2] "Union shop" agreements permitted by the Act are agreements requiring, as a condition of continued employment, that within 60 days following the beginning of such employment, or of the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class.

[3] 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).